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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JORGE ARNOLDO RAMIREZ, Defendant and Appellant.	G040732 (Super. Ct. No. R1F116116) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Gregg L. Prickett, Judge. (Judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Kristin A. Erickson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Jorge Arnoldo Ramirez of committing a lewd act upon a child under the age of 14. (Pen. Code, § 288, subd. (a); all further statutory references are to this code unless otherwise specified.) He challenges the sufficiency of the evidence to support his conviction. For the reasons expressed below, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On May 10, 2003, 13-year-old Jane Doe, defendant's wife's cousin, attended a family party at defendant's house. The adults played loud music and drank alcohol while Doe and several other girls congregated in an upstairs bedroom to watch television. When Doe left the bedroom and walked towards an adjacent bathroom, appellant approached her and offered her marijuana. Doe refused because she did not use drugs. Defendant said he knew she had been talking to a boyfriend on her cell phone earlier and insisted she take the marijuana. He then pushed her into the bathroom and locked the door. He backed her against a wall, lifted her so her legs were around him, and kissed her on the lips and cheek, and licked her face and neck. She screamed and tried to push him away. Defendant released her and she fell to the floor. He continued to kiss her and started pulling down her pants. Resisting, she pulled up her pants and pushed him away. During the struggle, defendant pulled down her jeans while pulling down his pants and Doe felt something hard between her legs, but he did not penetrate any part of her body. Doe yelled at defendant to get off her and to leave her alone. Eventually, she pushed defendant away with her knees and hands, pulled up her pants and left the bathroom. Defendant threatened to "tell everyone what [she] was doing" if she did not come back.

Doe reported the incident to her cousin, who in turn told Doe's mother when arriving home. The family contacted the Riverside County Sheriff's Office the

next morning. Doe, upset and crying, described the incident to Deputy Sheriff Michael Judes. A registered nurse conducted a sexual assault examination on Doe the same morning. With the aid of toluidine dye, the nurse found an abrasion on the posterior fourchette, an indication of sexual assault. A criminalist testified he found DNA matching defendant's DNA profile on the neck swab, explaining that a person simply touching another would be unlikely to transfer that person's DNA. Judes drove to defendant's residence and asked to speak to him about a rape allegation stemming from an incident the night before. Although Judes did not tell defendant he was a suspect, defendant asked whether he was under arrest for rape and agreed to accompany Judes to the sheriff's office for an interview. Defendant claimed during the interview he had a brief discussion with Doe telling her she should not use his phone to make long distance calls to her boyfriend, and advised her she was too young to date, but did not claim Doe asked him for marijuana or made sexual advances toward him.

At trial, however, defendant offered a different version of events. Defendant testified he was in the restroom washing his hands when Doe entered and closed the door behind her. She asked him for some marijuana. After he refused, she put her hands around his waist and kissed him on the lips. He kissed her back but did not kiss her on the neck. He then pushed her away, told her she had 10 minutes to leave his house, and never saw her again that evening. Defendant's daughter testified she saw her father walk into the bathroom and then saw Doe walk into it. Defendant's relatives testified Doe had a reputation for lying and that music at the party did not begin until 9:00 p.m., after Doe and her family had departed.

Following a trial in October 2007, the jury convicted defendant of committing a lewd act on a child under the age of 14 (§ 288, subd. (a)) as a lesser included offense to the charged crime of a lewd act by force or violence (§ 288, subd. (b)). It deadlocked on a charge of aggravated sexual assault (§ 269), which the

court later dismissed (§ 1385). The court sentenced defendant to the low term of three years in prison.

II

DISCUSSION

Section 288, subdivision (a), provides, "Any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ."

Defendant challenges the sufficiency of the evidence to support the jury's conclusion he committed a lewd act on Doe. We view the evidence disclosed by the record in the light most favorable to the judgment below. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) The test is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) We presume in support of the judgment the existence of every fact reasonably inferred from the evidence. (*Ibid*.) That the circumstances could be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) Indeed, even the uncorroborated testimony of a single witness is sufficient to sustain a conviction. (*People v. Gammage* (1992) 2 Cal.4th 693, 700.) Consequently, a defendant attacking the sufficiency of the evidence "bears an enormous burden." (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.)

Defendant contends we must reverse his conviction because Doe's testimony is inherently improbable. Specifically, defendant calls our attention to the unique acoustics of his house. Defendant's wife testified the slightest noise in the bathroom could be heard throughout the house because of a system of vents. Defendant's

daughter explained she and her sisters frequently communicated through the vents and one could hear everything throughout the house, even with music playing in the background. Defendant asserts we must reject Doe's testimony because no witness heard her screaming as she claimed. Defendant therefore concludes Doe's account is inherently implausible.

Appellate courts will not uphold a verdict based on inherently improbable testimony. But "'"testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]"'" (*People v. Mayberry* (1975) 15 Cal.3d 143, 150.) Here, Doe's testimony is not inherently improbable. Defendant mistakenly assumes the assault did not occur because several witnesses did not hear her scream. But defendant disregards the evidence the assault occurred while loud music played at a party with 30 to 40 guests. One witness testified loud music began around 7:00 p.m., before Doe and her family left, and was so loud "you had to practically scream to talk to someone." This constituted substantial evidence from which the jury reasonably could conclude Doe's screams would not have been heard or noticed by the partygoers.

Defendant also contends the evidence did not establish he committed a lewd act with the intent of sexual gratification. Because the jury acquitted him of committing a lewd act by force, violence, duress, menace, or fear, defendant concludes the jury necessarily rejected Doe's testimony, which defendant characterizes as a "brutal

sexual assault," and accepted his version of events, which he argues did not establish the requisite willful touching and sexual intent.

The jury's acquittal of the count alleging he committed a forcible lewd act does not reflect the jury rejected Doe's testimony. A forcible lewd act under section 288, subdivision (b)(1), requires the *force* used to "'be substantially different from or substantially greater than the force needed to accomplish the act itself.'" (*People v. Cicero* (1984) 157 Cal.App.3d 465, 473-474.) Here, defendant did not strike or otherwise assault Doe. The jury may have reasonably determined he used only the force necessary to accomplish the lewd acts described by Doe. Similarly, the jury's inability to decide whether defendant committed aggravated sexual assault (§ 269) is explained by Doe's testimony defendant "'kind of did touch a little bit between [her] legs, but didn't go in.'" The court instructed penetration, however slight, was required. Although Doe's testimony may have left reasonable doubt whether defendant used force, substantial evidence supports the jury's verdict defendant committed a lascivious act with a lewd intent in violation of section 288, subdivision (a).

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.